84-1899

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ALEXANDER L. STEVAS,
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SUPREME COURT OF THE UNITED STATES

October Term, 1984

No._____

IRENE MUELLER,

Petitioner

v.

DAVID DIEBALL, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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OF IRENE MUELLER

35 pp

QUESTIONS PRESENTED FOR REVIEW

(1) Must a plaintiff produce evidence in opposition to a defendant's motion for summary judgment, when plaintiff relies upon the facts contained in the motion and its moving papers which in and of themselves raise triable issues of fact?

(2) Whether a cause of action exists for violation of civil rights, as encompassed by 42 U.S.C. 1983, based upon police officers' negligent spoilation or destruction of evidence, while conducting an investigation, even if the officers are acting in good faith?

PARTIES INVOLVED

Plaintiff:

(1) Estate of Irene Mueller

Defendants:

(1) J. C. Penney Company

(2) Carol J. Manstrom

(3) Valerie Rich

(4) Liberty Mutual Insurance Company

(5) Dolores Mac Carson

(6) Marijane Ramstead

(7) Ted Chatterton

(8) David Dieball

(9) Forest Scott Stanton

(10) John Kenney

(11) Michael P. Stone

(12) The City of Orange

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OPINION BELOW

On June 7, 1982, the United States District Court for the Central District of California granted a summary judgment in favor of defendants. (Appendix A) The United States Court of Appeals for the Ninth Circuit, after oral arguments and submission on December 3, 1984, filed a Memorandum Opinion on January 2, 1985. (Appendix B) A petition for rehearing before the United States Court of Appeals for the Ninth Circuit was denied on February 5, 1985.

JURISDICTIONAL STATEMENT

The grounds upon which the jurisdiction of this Honorable Court is invoked are:

(i) The date that the judgment which is sought to be reviewed was entered on January 2, 1985 (Appendix B);

(ii) The United States Court of Appeals for the Ninth Circuit denied a petition for hearing on February 5, 1985; and

(iii) This petition for hearing is timely in that it is filed within ninety days of the date that the petition for rehearing was denied, pursuant to 28 U.S.C. §2101(c).

CONSTITUTIONAL PROVISIONS AND FEDERAL STATUTES INVOLVED

Fourteenth Amendment:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. §1983. Civil action for deprivation of rights.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this sec-

tion, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be statute of the District of Columbia."

STATEMENT OF THE CASE

On January 25, 1979, Irene Mueller was confronted and detained by a J.C. Penney security guard for shoplifting four bottles of perfume. An altercation between Irene Mueller (petitioner herein, being Estate of Irene Mueller, substituted in by court order (Appendix C)) and the security guard occured which caused plaintiff to sustain physical and emotional injuries. J.C. Penney store personnel then contacted the Orange Police Department, which dispatched officers to the scene. One of the police officers, while conducting the investigation of the incident, received a business card from an eyewitness to the entire series of event. This police officer has stated that he believes he gave the business card to another police officer who was participating in the investigation. This second police officer cannot recall having received the business card from the first

officer. A third police officer then arrived and petitioner was placed under arrest and was subsequently convicted of petty theft, assault and battery.

Petitioner then brought a civil action against J.C. Penney, the security officer, and police officers for assault and false imprisonment.

In both the criminal and civil actions petitioner has claimed that the sole competent eyewitness who was crucial to her exhonoration of the criminal charges and her recovering on the civil action, was unavailable for the presentation of her cases. The unavailability of this witness was a direct and actual result of the police officers losing the only means of identifying this witness: The business card. Petitioner therefore, as a result of her conviction in the criminal action and the adverse judgment in the civil action, filed the present claim against the police offi-

cers for a violation of her civil rights pursuant to 42 U.S.C. §1983. This claim was based on the admissions of the police officers, that they had lost the identification of the only eyewitness. Petitioner has insisted that this eyewitness was crucial to her receiving a full and fair hearing in both the civil and criminal actions. The fact that the police had lost this identification was admitted in affidavits filed by the officers in support of their motion for summary judgment.

The District Court made no finding of fact as to whether the admitted loss of the evidence by the police officers interfered with the petitioner's civil rights. The court found that there was not a violation of petitioner's civil rights because neither

a conspiracy occurred nor was excessive force used against petitioner.

The District Court, in an earlier proceeding had ruled that "[b]ecause plaintiff persistently and willfully refused to be deposed by defendants. . . her testimony would be excluded at time of trial [and] that testimony also cannot be introduced into evidence in connection with defendants' Motion for Summary Judgment." (See Appendix A)

The District Court granted the summary judgment on the bas s that "Plaintiff did not appeal or contest these sanctions nor did she comply with defendants discovery request. Plaintiff therefore failed to produce any evidence sufficient to oppose defendants motion fo summary judgment." (Memorandum opinion of United States Court of Appeals for the Ninth Circuit, Appendix B page 2, lines 18-21, emphasis added.)

On September 6, 1984, the personal representative was substituted for Irene Mueller, who had died on May 23, 1984 (Appendix C).

ARGUMENT

Petitioner was convicted of petty theft on November 10, 1980. In a separate and distinct civil action petitioner brought suit against the security guard, Carol Manstrom, and her employer, J.C. Penney Co. This action was for injuries petitioner received arising out of an alleged assault which occurred during Carol Manstrom's citizen's arrest of petitioner.

In the course of the police investigation an eyewitness to the events that had transpired gave a business card to the police, so that they could contact him, in case he was needed as a witness to the events that transpired. The police officers, defendants to the action herein, lost the business card, and there with it the identification of a material witness crucial to petitioner.

As a direct consequence of the police officer's loss of the identification of this material witness, petitioner was denied a full and fair hearing in her civil action for damages for the alleged assault.

The police officers, acting under color of state law, as lawfully appointed police officers, did cause a deprivation of petitioner's right to access to courts for a full and fair hearing. Therefore, a jury could determine that the police officers are liable to petitioner for all injuries sustained by petitioner, as appropriate under 42 U.S.C. §1983.

Allegations that officers acting under color of law which prevent a plaintiff from presenting evidence, constitutes a violation of a fair trial and of due process. Henderson v. Fisher, 631 F.2d 1115 (3rd Cir. 1980). In Henderson, campus police officers seized a pair of pants from a suspect in a rape case. Before trial, a campus police

officer removed the pants from the police evidence locker, in an apparent attempt to prevent the defendant from using them as exculpatory evidence, in a defense of mistaken identity. The court held that this violated the defendant's Constitutional rights. "To deny a defendant an opportunity to present competent proof in his defense constitutes a violation of a fair trial and due process." Henderson at 1119, citing Clark v. Reid, 441 F.2d 801, 804 (5th Cir. 1971).

In Adickes v. S.H. Kress and Company, 398 U.S. 144; 90 S.Ct. 1598 (1970), the court, citing United States v. Diebold, 369 U.S. 654, 655; 82 S.Ct. 993, 994 (1962), stated that "[o]n a summary judgment the inferences to be drawn from the underlying facts contained in [the moving party's] materials must be viewed in the light most favorable to the party opposing the motion."

The Court goes on to quote from the

Advisory Committee Note on the 1963 amendment to subdivision (e) of Rule 56. In weighing evidentiary matter this Court stated "[w]here the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied, even if no opposing evidentiary matter is presented." (emphasis in the Court's opinion)

The court's function upon a motion for summary judgment is not to resolve issues of fact but to determine whether any material factual issues are present after resolving all questionable in favor of the party against whom the judgment is sought. DeJesus v. Ward, 441 F.Supp. 215 (S.D.N.Y. 1977) citing United States v. Matheson 532 F.2d 809; 813 (2d Cir.) cert denied 429 U.S. 823; 97 S.Ct. 75; 50 L.Ed.2d 185 (1976).

Petitioner's cause of action for civil rights violation was based on the police officers' admitted loss of the business card, which caused her to not be able to contact the sole impartial and credible witness to her arrest on January 25, 1979.

As a result of not being able to present this crucial witness in either her criminal or civil trials, petitioner did not receive a full and fair hearing sufficient to meet the due process requirements of the Fourteenth Amendment. This violation of petitioner's due process rights was directly caused by the police officers' loss of the business card.

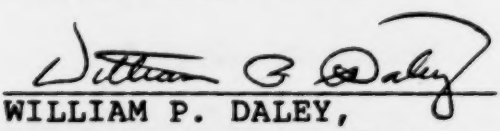
CONCLUSION

Based upon the facts, in a light most favorable to the party (petitioner) opposing the motion for summary judgment, the District Court's ruling was in error for three reasons. First, the District Court issued its ruling based on the fact that

plaintiff-petitioner did not present evidence in opposition to the motion. Secondly, the court's judgment was in error in that defendants' own admissions in their sworn affidavits, and case law, both support the proposition that the petitioner pleaded facts sufficient to constitute a cause of action not vulnerable to a motion for summary judgment. And, finally, there remain triable issues of fact that have, as yet, not been determined adequately.

We pray that Certiorari be granted to resolve the serious issues presented herein.

Respectfully submitted,



WILLIAM P. DALEY,
Attorney for the Estate
of Irene Mueller

APPENDIX A

IRENE MUELLER v. DAVID DIEBALL, et al.

United States District Court

Central District of California

Case No. CV 81-1107 TJH

Decided June 18, 1982

.....

HATTER, United States District Judge

Judgment

On June 7, 1982, the Motion for Summary Judgment of Defendants Carol J. Manstrom, Valerie Rich Johnson, Dolores Mae Carson, Marijane Ramstead, Ted Chatterton, Liberty Mutual Insurance Company and J.C. Penney Company came on regularly for hearing before the Honorable Terry J. Hatter, Jr.

Upon consideration of the moving papers submitted in support of, and in opposition

to, this motion and the oral arguments of counsel for defendants and plaintiff;

IT IS HEREBY ADJUDGED AND DECREED THAT:

There are no genuine issues of any material fact, plaintiff's case is without merit and defendants are therefore entitled to Summary Judgment as a matter of law. Plaintiff's complaint is therefore dismissed with prejudice.

Findings of Fact and Conclusions of Law

Upon consideration of the moving papers in support of defendants' Summary Judgment Motion, and oral argument of counsel for the defendants and plaintiff,

IT IS ORDERED under Fed. R. Civ. P. 56(b) that the following findings of fact and conclusions of law are without substantial controversy:

FINDINGS OF FACT

1. Probable cause existed to arrest and detain the plaintiff after she shoplifted cosmetic items from the J.C.

Penney Store in the City Mall, in Orange, on or about January 25, 1979.

2. After placing the plaintiff under citizen's arrest, J.C. Penney store personnel contacted the Orange Police Department.

3. None of the defendants used excessive force against the plaintiff during her detention.

4. Officer Kenney received a business card from an unidentified individual (identified as "Mr. X" in the criminal proceeding) which he beleives [sic] that he then gave to Officer Straton before leaving the store.

5. Officer Straton did not recall receiving this business card from Officer Kenney.

6. None of the defendants conspired to destroy this business card, nor did any of them conspire to conceal the identity of "Mr. X."

7. None of the defendants conspired to disperse witnesses connected with plaintiff's criminal trial.

8. None of the defendants committed perjury or conspired to commit perjury at plaintiff's criminal trial.

9. None of the defendants conspired to supress evidence favorable to plaintiff's defense in connection with her criminal trial.

10. There was no conspiracy between J.C. Penney Company and the City of Orange Police Officers to deprive citizens of their constitutional rights.

11. All of the individual defendants in this action acted with good faith and with the reasonable belief that their actions were legal in connection with the detention and arrest of plaintiff for shoplifting on January 25, 1979.

12. No one directed defendants Carol J. Manstrom or Marijane Ramstead on how to

testify at plaintiff's November 1980 criminal [trial.]

13. Plaintiff has willfully failed to obey previous Court orders regarding discovery efforts of the defendants.

14. The plaintiff has willfully failed to prosecute this action.

15. Any Conclusion of Law more appropriately deemed to be a Finding of Fact is incorporated herein as a Finding of Fact.

CONCLUSIONS OF LAW

1. Plaintiff is collaterally estopped from raising any claims regarding perjury of the defendants because this issue was decided in their favor during her previous criminal trial.

2. Since none of the individual defendants used excessive force against plaintiff and had probable cause to detain and arrest her, there was no violation of her civil rights under 42 U.S.C. §1983.

3. Plaintiff is collaterally estopped from raising any claims regarding probable cause, dispersion of witnesses, the loss of evidence and the existence of excessive force because she was found to be guilty of petty theft and assault and battery at her criminal trial and these issues were resolved adversely against her at that trial.

4. Because plaintiff persistently and willfull refused to be deposed by defendants, this Court ruled January 4, 1982, that her testimony would be excluded at time of trial. That testimony also cannot be introduced into evidence in connection with defendants' Motion for Summary Judgment. In addition, the testimony of Mr. Frank Marchuk is also inadmissible because it is hearsay.

5. Plaintiff has therefore failed to produce any admissible evidence sufficient to oppose defendants' Motion for Summary Judgment.

6. Plaintiff cannot maintain a cause of action against the City of Orange for violation of her civil rights because there has been no showing that the City endorsed or encouraged such conduct. Monell v. Dept. of Social Services, 436 U.S. 658 (1978).

7. Plaintiff cannot maintain a cause of action against any of the private individuals for violation of her civil rights because there has been no showing that they were acting under color of state law.

8. Any Finding of Fact more appropriately deemed a Conclusion of Law shall be incorporated here as a Conclusion of Law.

APPENDIX B

IRENE MUELLER v. DAVID DIEBALL, et al.

United States Court of Appeals

For the Ninth Circuit

No. 82-5633

Filed January 2, 1985

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Appeal from the United States District Court for the Central District of California
Terry J. Hatter, District Judge, Presiding

Argued and Submitted December 3, 1984

SNEED, ANDERSON and FERGUSON, Circuit Judges

Memorandum*

Plaintiff Irene D. Mueller was detained by a J.C. Penney security guard after she

* This panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, foregoing publication in the Federal Reporter, and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21(c).

shoplifted four bottles of perfume from the J.C. Penney store in Orange, California. J.C. Penney store personnel then contacted the Orange Police Department, which dispatched officers to the scene. One of the officers received a business card from an unidentified individual who had witnessed the altercation which took place between Mueller and the security guard when the guard requested her to return to the store. Another identified individual also witnessed the altercation. The officer receiving the card believed he subsequently gave it to another officer who replaced him at the scene. The replacement officer did not recall receiving the card, and the card was never found. Another police officer then arrived at the scene and Mueller was arrested. She confessed to shoplifting the perfume.

Mueller was subsequently convicted of petty theft, assault and battery. She was

sentenced to three years' probation with a $250.00 fine. Mueller unsuccessfuly appealed her conviction.

Mueller then brought an action pursuant to 42 U.S.C. §1983, naming various police officers, the City of Anaheim [Orange], certain J.C. Penney security personnel, Liberty Mutual Insurance Company and J.C. Penney Company, Inc. as defendants. She alleged violation of her civil rights based on the shoplifting incident. The defendant moved for summary judgment. Because Mueller refused to be deposed by the defendants, the district court ruled that her testimony could not be introduced into evidence in connection with the defendants' motion for summary judgment nor at the time of trial. Plaintiff did not appeal or contest these sanctions nor did she comply with defendants' discovery requests. Plaintiff therefore failed to produce any evidence sufficient to oppose defendants' motion for

summary judgment. The district court thus found that there were no genuine issues of fact and concluded that the defendants were entitled to summary judgment as a matter of law. Mueller appeals.

We find the district court's grant for summary judgment appropriate. Plaintiff cannot maintain a cause of action under §1983 against any of the private individuals because there has been no showing that they were acting under color of state law. See Fonda v. Gray, 707 F.2d 435, 438-39 (9th Cir. 1983). She cannot maintain a cause of action against the City of Orange because there has been no showing that she is basing the alleged liability of the city on other than a respondeat superior theory. See Monell v. Department of Social Services, 436 U.S. 658, 691 (1978). Finally, plaintiff cannot maintain a cause of action under §1983 against defendant police officers because the unopposed evidence submitted by

the officers demonstrated they acted in good faith. See Pierson v. Ray, 386 U.S. 547, 555-58 (1967) (police officers are not liable for monetary damage under §1983 if they acted in good faith and with probable cause); Smiddy v. Varney, 665 F.2d 261, 266-67 (9th Cir. 1981), cert. denied, 459 U.S. 829 (1982).

Therefore, because plaintiff failed to produce any evidence sufficient to oppose defendants' motion for summary judgment, we hold that summary judgment was properly entered against her pursuant to Rule 56(e) of the Federal Rules of Civil Procedure.

AFFIRMED

APPENDIX C

IRENE MUELLER v. DAVID DIEBALL, et al.

United States Court of Appeals

For the Ninth Circuit

No 82-5633

DC CV 81-1107-TJH

Filed February 5, 1985

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SNEED, ANDERSON and FERGUSON, Circuit Judges.

Order

The petition for rehearing is DENIED.

APPENDIX D

IRENE MUELLER v. DAVID DIEBALL, et al.

United States Court of Appeals

for the Ninth Circuit

No. 82-5633

DC CV 81-1107 TJH

Filed September 6, 1984

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BARNES, Circuit Judge

Order

The motion filed on August 23, 1984 to substitute appellant's personal representative pursuant to Fed. R. App. P. 43(a) for appellant, who died on May 23, 1984 while the appeal was pending, is granted.

CERTIFICATE OF SERVICE

I, William P. Daley, Esq., certify that on or before the May 28, 1985, I mailed, postage prepaid, 40 copies of this Petition for Certiorari to the Clerk, U.S. Supreme Court, and mailed one copy, postage prepaid to Office of the Clerk, Court of Appeals, P.O. Box 547, San Francisco, California, 94101; one copy, to Cotkin, Collins, Kolts and Franscell, 550 S. Hill Street, Suite 1300, Los Angeles, California, 90013; and one copy to David Highman, P.O. Box 1786, Newport Beach, California, 92660.

William P. Daley